

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD DAWAYNE GRAY,

Defendant-Appellant.

UNPUBLISHED

April 10, 2007

No. 267647

Genessee Circuit Court

LC No. 05-015529-FC

Before: Wilder, P.J., and Sawyer and Davis, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct, MCL 750.520b(1)(c), kidnapping, MCL 750.349, and unlawfully driving away an automobile, MCL 750.413. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to 75 to 112 years' imprisonment for his first-degree criminal sexual conduct conviction, to life imprisonment for his kidnapping conviction, and to 20 to 40 years' imprisonment for his unlawfully driving away an automobile conviction. He appeals as of right. We affirm.

Defendant's sole claim is that the trial court erred by failing to properly apply the procedures set forth in *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 69 (1986). A prosecutor's right to exercise a peremptory challenge is limited by the United States Supreme Court's holding that peremptory challenges based on race violate the Equal Protection clause of the Fourteenth Amendment. *Id.* at 87-88. *Batson* mandates a three-step process, which is to be employed in both criminal and civil proceedings, to determine whether a peremptory challenge is based on purposeful discrimination. *Id.* at 96-98. First, the opponent of the peremptory challenge must establish a prima facie case of racial discrimination. Second, if the first step is satisfied, the burden of production shifts to the proponent of the challenge to produce a race-neutral justification for the strike of the individual venire member. Third, the trial court must articulate its decision regarding whether the opponent of the strike has proved purposeful racial discrimination. *People v Bell*, 473 Mich 275, 278-279; 702 NW2d 128 (2005), amended 474 Mich 1201 (2005).

During voir dire in the instant case, defense counsel made a *Batson* challenge after the prosecutor used peremptory challenges to excuse three African-American venire members. Defense counsel did not request to make a record at that time and did not object to a particular challenge. He merely requested an opportunity to notify the court and the prosecutor that a pattern of striking African-American jurors was beginning to emerge.

After the prosecutor excused an additional African-American venire member defense counsel made a second *Batson* challenge. The trial court refused to allow the parties an opportunity to create a record at that time.

Jury selection terminated on day one of the trial and the venire was dismissed. The next morning, before the jury was sworn, defense counsel renewed his *Batson* challenge asserting that the prosecutor's dismissal of African-American jurors evidenced a pattern of discriminatory use of peremptory challenges. The prosecutor did not wait for the trial court's ruling on whether defendant had established a prima facie case of purposeful discrimination before offering race-neutral explanations for the peremptory challenges. However, he failed to state a reason for each of the veniremembers listed by defendant. Additionally, the prosecutor exhibited some misunderstanding of *Batson* by referring to the overall racial composition of the jury rather than offering specific non-discriminatory reasons for each peremptory challenge. The prosecutor also asserted in error that two of the four dismissed venire members had been challenged for cause.

Although defendant corrected the prosecutor's assertion that any of the four venire members mentioned in his challenge were dismissed for cause, nevertheless, the prosecutor still did not offer specific reasons for the peremptory challenges of the jurors at issue.

The trial court's ruling focused exclusively on the design of the circuit court's venire selection process and the racial composition of the petit jury that was selected the day before.

THE COURT First, let me say that some time ago this Court was concerned about jury representation and on demand on two occasions has conducted hearings to examine the reliability and the cross-representation of the jury veneer [sic].

At those hearings the Court has ruled that the selection process is valid, that the veneer [sic] is valid.

It would be defendant's duty, in this case, to show that something has changed, and frankly the method that the Court knows has not changed. And since the defense has not shown a change, and since also there remain three African American people on the jury, the Court denies the *Batson* challenge.

MR. HOLT Judge – uh – not to provoke the Court, but distinguish, please, a challenge to the array . . . it is to be differentiated totally from the *Batson* motion relative to the prosecutor's intentional exclusion of minority group diverse who are the same minority as the defendant.

THE COURT Perhaps, but there remain three African Americans on the jury, so it is a well represented body in this trial.

The trial court failed to rigorously follow the *Batson* procedure or to articulate its findings of fact and legal conclusions for the record. However, although trial courts are strongly urged to clearly articulate their findings at each step of the *Batson* three-step test, appellate review is not precluded by a trial court's failure to do so. *People v Knight*, 473 Mich 324, 339; 701 NW2d 715 (2005).

Where “the trial court fails to clearly state its findings and conclusion on the record, an appellate court must determine on the basis of a fair reading of the record what the trial court has found and ruled.” *Id.* Once that is determined, this Court must decide what *Batson* step is at issue and which standard of review applies to that particular step. *Id.* “[T]he first *Batson* step is a mixed question of fact and law that is subject to both a clear error (factual) and a de novo (legal) standard of review.” *Id.* at 342. The second step is subject to de novo review. *Id.* at 344. Step three, whether the opponent of the peremptory challenge has satisfied the ultimate burden of proving purposeful discrimination, is a question of fact that is reviewed for clear error. *Id.* at 345.

Applying *Knight* to the record here, we conclude that the trial court determined that defendant had failed to establish a prima facie case of discrimination and that this determination was not erroneous.

To establish a prima facie case of discrimination based on race, a defendant must show:

(1) he is a member of a cognizable racial group; (2) the proponent has exercised a peremptory challenge to exclude a member of a certain racial group from the jury pool; and (3) all the relevant circumstances raise an inference that the proponent of the challenge excluded the prospective juror on the basis of race. [*Knight, supra* at 336.]

The mere fact that a prosecutor used one or more peremptory challenge to excuse African-American venire members is insufficient to establish a prima facie showing of discrimination. *People v Williams (After Remand)*, 174 Mich App 132, 137; 435 NW2d 469 (1989). Here, the defendant alleged nothing more than the race of the venire member as the basis for his claim of a *Batson* violation by the prosecutor. Although the prosecutor used four peremptory challenges to dismiss venire members who were identified in the record as African American, the prosecutor did not ask any questions or make any statements during voir dire that support an inference of discrimination. In fact, while defendant is African-American and the victim is Caucasian, the prosecutor asked the prospective jurors if they felt that the race of either the victim or defendant would influence their judgment and cautioned them that “[t]his case is not about race.” Furthermore, the record reflects no pattern of strikes against African-American veniremembers that would give rise to an inference of discrimination. The prosecutor did not exercise peremptory challenges against three African-Americans, who were eventually sworn as jurors although he had several peremptory challenges remaining. A prosecutor’s acceptance of a jury with minority members when peremptory challenges remain “is strong evidence against a showing of discrimination.” *Id.* at 137. On the record as a whole, defendant’s blanket assertion of discriminatory challenges, without more, fails to show that the trial court clearly erred in concluding that defendant failed to establish a prima facie case of discrimination.

We further note that the apparent confusion on the part of a trial court regarding whether *Batson* is violated if the jury contains too few minority jurors does not constitute an error requiring reversal. *Knight, supra* at 352. Here, as in *Knight*, the trial court’s confused statement was nevertheless clear on the point that the court found no evidence of purposeful discrimination. *Id.* at 348. Accordingly, the prosecutor was not required to articulate a race-neutral explanation for his peremptory challenges, and the trial court was not required to determine whether defendant had proved purposeful discrimination. *Id.* at 337-338.

Affirmed.

/s/ Kurtis T. Wilder
/s/ David H. Sawyer
/s/ Alton T. Davis